BY EMAIL ONLY (environmentalrev.dnr@state.mn.us)

September 5, 2012

Lisa Fay, Planner Principal
Minnesota Department of Natural Resources
500 Lafayette Road, Box 25
St. Paul, MN 55155-4032

Re: EAW Notice (EQB, Aug. 6, 2012): U.S. Steel—Minntac Mine Extension.

Dear Ms. Fay:

This letter constitutes the comments of the Fond du Lac Band of Lake Superior Chippewa and the Grand Portage Band of Lake Superior Chippewa (the "Bands") on the above project (the "Project"). Based upon the size of the Project, the lack of sufficient environmental review for the existing Minntac operation, and the current violations of the Clean Water Act ("CWA") at both the existing and proposed new operations, it is the Bands' position this Project must be treated as *new*, "major governmental action" with the "potential for significant environmental effects" within the meaning of the Minnesota Environmental Protection Act ("MEPA").[1] Therefore, a detailed environmental impact statement ("EIS"), as well as significant remediation and a new NPDES permit, are required before this Project can go forward.

The Bands are federally recognized Indian tribes and are member bands of the Minnesota Chippewa Tribe ("MCT"). Along with other MCT Bands, the Bands retain hunting, fishing, and other usufructuary rights that extend throughout the entire northeast portion of the state of Minnesota under the 1854 Treaty of LaPointe[2] (the "Ceded Territory"), which encompasses in the area of the Project.[3] In the Ceded Territory, the MCT Bands have a legal interest in protecting natural resources, which are also treaty resources. Minnesota tribes have successfully sued to enforce off-reservation treaty rights[4] and MCT Bands now jointly manage treaty resources within the Ceded Territory with the DNR.[5] Any project within the Ceded Territory that has the potential to affect treaty resources, which includes any project that may affect air and water quality, fisheries, wildlife habitat, or other natural resources, requires notice to and consultation with the Bands.

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[1] Minn. Stat. § 116D.04 subd. 2a.
[2] Treaty with the Chippewa, 1854, 10 Stat. 1109, in Charles J. Kappler, ed., *Indian Affairs: Laws and Treaties*, Vol. II (Washington: Government Printing Office, 1904), available on-line at http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0648.htm (last visited Aug. 14, 2012).
[3] *See* Map of 1854 Ceded Territory, attached at Ex. A.
[4] *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 201-202 (1999).
[5] *See, e.g.*, DNR's 1854 Treaty page, available on-line at http://www.dnr.state.mn.us/aboutdnr/laws_treaties/1854/index.html (last visited Aug. 29, 2012).

Yet this EAW was prepared without any effort by the DNR to consult with the Bands, and it makes no reference whatsoever to the significant tribal interests this Project would impact. This contradicts explicit state policy. Former Governor Tim Pawlenty signed Executive Order 03-05 requiring that state agencies recognize that there is a government-to-government relationship between the state and Indian tribes.[6] Furthermore, the state and its agencies should "consult with the governments of the affected Indian tribe or tribes regarding a State action or proposed action that is anticipated to directly affect an Indian tribe."[7] The failure to do this means that the EAW fails to take into account tribal interests in the area and significant technical data the Bands maintain relating to the area of the Project. Given that the Bands jointly manage Ceded Territory natural resources with the DNR, and the requirements throughout state and federal law to consult with tribes, it is difficult to understand why the DNR as RGU failed to involve the Bands from the start.

Additionally, here, the U.S. Army Corps of Engineers will issue a Section 404 permit, and presumably, the EPA will also be involved in the CWA review. All federal agencies share in the federal government's trust responsibility to the Bands to maintain those treaty resources.[8] Tribal consultation and full evaluation of treaty resources will also have to happen before either of those agencies can issue a permit.

Moreover, the Bands have Treatment-in-the-same-manner-As-a-State ("TAS") status under the Clean Water Act for purposes of administering water quality standards ("WQS"), and are treated as a downstream regulators from the Project (and the state of Minnesota). To the extent that there is a dispute between the state and the Bands regarding whose WQS should apply to the Project, the Bands can seek recourse to the EPA to act as mediator between the two before issuance of any new NPDES permit, if ultimately required, as the Bands argue it must be.[9]

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[6] Exec. Order 03-05, http://www.leg.mn/archive/execorders/03-05.pdf (last visited Aug. 29, 2012).

[7] *Id.*

[8] *See, e.g.*, Exec. Order 13175—Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating "the United States has recognized Indian tribes as domestic dependent nations under its protection . . . .," there is a "trust relationship with Indian tribes," and "[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments."), available at http://ceq.hss.doe.gov/nepa/regs/eos/eo13175.html (last visited Aug. 14, 2012). *See also* USACE Tribal Consultation Policy (Draft/Deliberative) (Jan. 2012), available at http://www.usace.army.mil/Portals/2/docs/civilworks/tribal/consult_policy_draft_jan2012.pdf (last visited Aug. 14, 2012).

[9] 40 C.F.R. § 121.13. *See also Wisconsin v. EPA*, 266 F.3d 741, 748 (7th Cir. 2001) ("Once a tribe is given TAS status, it has the power to require upstream off-reservation dischargers, conducting activities that may be economically valuable to the state (*e.g.*, zinc and copper mining), to make sure that their activities do not result in contamination of the downstream on-reservation waters (assuming for the sake of argument that the reservation standards agree more

I. Existing CWA violations at the Minntac site.

Since 2005, the Bands have been working cooperatively with the Minnesota Pollution Control Agency ("MPCA") and U.S. Steel, along with other MCT-member Band, Bois Forte, towards Minnesota Water Quality Standards ("WQS") compliance for the U.S. Steel Minntac mine tailings basins. We have good reason for our concern about past, present, and future natural resource impacts from Minntac's current operations and proposed Project.

This Project involves a 483-acre extension of its existing open pit mining facilities in Mountain Iron, with taconite produced from the extension to continue to be processed at the existing Minntac facility" at the current levels of production." But any expansion will unquestionably cause further degradation to waters with an existing water quality impairment, however, one that arises from Minntac's own operations, a matter the Bands' representatives have raised at numerous federal consultation sessions.

The Minntac tailings basin discharges to three watersheds, the Sandy, Dark, and West Two River Watersheds, through engineered seeps and also via groundwater discharges. But Minntac's tailings basin National Pollutant Discharge Elimination System ("NPDES") permit MN005249 expired July 31, 1992 and has been amended multiple times in violation of the CWA, despite ongoing violations. In fact, based on the content of the later SOCs, it appears that Minnesota WQS were even being violated *prior to* re-issuance of the permit in 1989. Discharging untreated tailings basin wastewater that contains concentrations of sulfate, chloride, fluoride, manganese, hardness and specific conductance, that exceed MN WQS are causing ongoing damage to the treaty-protected fisheries and wild rice resources in these watersheds, and an expansion will only increase this damage.

Minntac has been permitted to keep operating under a series of ineffective "Schedules of Compliance" ("SOCs"). Federal regulations provide that any permit must contain limits and conditions necessary to ensure compliance with all applicable water quality standards, especially where the state knows that a discharge will cause or contribute to an excursion of water quality standards.[10] The means by which a violator can be brought into compliance is an SOC, or "an enforceable sequence of actions . . . leading to compliance with an effluent limitation . . . ."[11] Compliance schedules longer that one year must include interim requirements and dates for their achievement on at least an annual basis in the permit.[12] Compliance schedules may extend beyond the term of a permit, if this is done in a manner that is consistent with the CWA and EPA's regulations.[13] The purpose is to accomplish the final effluent limitation "as soon as possible."[14]

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stringent than those the state is imposing on the upstream entity).") (internal citations omitted). Minntac's NPDES permit for its existing operation expired in 1992.

[10] 40 C.F.R. § 122.44(d).

[11] 33 U.S.C. § 1362(17).

[12] 40 C.F.R. § 122.47(a)(3).

[13] 40 C.F.R. §§ 122.44 and 122.47.

[14] 40 C.F.R. § 122.47(a)(1).

But as evidenced by the lack of any consequence for exceedence, neither the expired NPDES permit nor the string of SOCs contain adequate limits and in over 20 years, Minntac has been unable to comply with them anyway. And, to our knowledge, the MPCA has never imposed final water quality-based effluent limits ("WQBELs") to limit Minntac tailings basin pollutant loadings to impaired waters of the State.

The following summary just since 2000, drawn from MPCA records, illustrates how these SOCs have been solely a means of "kicking the can down the road" along with the other ways the company has sidestepped the CWA:

- In 2000, MPCA issued a letter of warning to Minntac for sulfate and specific conductance water quality violations from discharges at the facility.

- In 2001, the second SOC was entered into to develop information to complete a variance application for sulfate, specific conductance, hardness, and chloride.

- In 2003, a third SOC was signed to further study the Sulfate-reducing Packed-bed Bioreactor ("SPB") technology to reduce sulfate concentrations. Volume III of the Minntac NPDES permit application EIS, section A, page 5, subpart w, provided:

  > In its Response to Comments on the draft Environmental Impact Statement, the MPCA stated "the SPB is being tested for the effectiveness of removing sulfate from the wastewater and is a pilot project. If the technology proves to be ineffective, the MPCA will require the Company to choose another mitigation option from the SOC…The other technologies/process changes that are listed in the EIS scoping document were not fully assessed under the October 2003 Schedule of Compliance (SOC) because the company and MPCA agreed that they appeared to be more problematic from either a technical or financial feasibility standpoint. If at some point the SPB did not work out, the other 'shelved options' must be reconsidered.

  The SPB was tested and found to be ineffective at removing the pollutants of concern. Yet no other method was either tested or implemented.

- In 2006, Minntac requested a NPDES permit re-issuance with a variance, but ultimately pulled the application, presumably due to the fact that it was clear the NPDES permit could not be re-issued without significant remediation of the existing degradation. The 2006 Minntac EIS identified the following impacts:

  - Seepage from the basin had increased the concentrations of pollutants in the Dark and Sandy Rivers.

- The Dark River already violated WQS for sulfates, hardness, conductance and manganese under certain flow regimes.

- Additionally, the Sandy River already violated WQS for sulfates, chlorides, hardness, and conductance. The cause of the violations appeared to be directly and exclusively related to the seepage and discharges from the Minntac tailings basin.

- Based on recent research, it was suspected that the presence of sulfates promoted the methylation of mercury. Due to sulfate releases and resulting high methlymercury concentrations downstream from the tailings basin seepage points, mercury content of fish in the system is increasing. Any additional releases into these watersheds will continue to further negatively impact the fishery resources, potentially adversely affecting the health of tribal members consuming fish.

- In 2007, a fourth SOC was signed that superseded the 2006 SOC, and was again implemented and subsequently amended. Yet, the 2007 SOC *again* discussed SPB technology as a possibility, and discussed water modeling and water management as potential "solutions" prior to the company requesting a variance. This was after the Bands suggested in 2006 to the MPCA and to U.S. Steel that mining companies in western States have successfully employed reverse osmosis/nano-filtration to comply with WQS.

- In 2008, U.S. Steel sent MPCA an application for a reverse osmosis/nano-filtration wastewater treatment plant. But in 2009, according to MPCA staff, U.S. Steel requested from MPCA that their application for a reverse osmosis/nano-filtration wastewater treatment plant be pulled from consideration.

- In 2010, a barrier was installed between the tailings basin and the Sandy River which reduced the amount of polluted water reaching the Sandy River, but has not resulted in compliance with either state surface water or groundwater quality standards.

The following rates of exceedence are drawn from the MPCA's records and illustrate the true effect of the existing violations:

Year of Operation	Excess Pounds of Sulfate	Excess Pounds of Hardness
2006	80,847	0
2007	69,839	241,167
2008	54,904	352,125
2009	18,207	31,133
2010	57,558	741,468

These CWA violations must be addressed before any expansion can be permitted. Federal precedent states that any new discharges that would result in further degradation to waters with an existing water quality impairment are *not* legally permitable under the CWA.[15] That Minntac operates under an *expired* NPDES permit that has been constantly "extended" through the use of SOCs and illegal amendments, which it continually violates, does not distinguish this from cases where a *new* permit is denied on the same basis. In any case, a full EIS is required, including detailed analysis of these violations and a plan for full remediation, before this Project can go forward.

II. The EAW fails to adequately evaluate impacts to water resources.

But the EAW makes *nearly no mention* of these violations, instead asserting without any support that no additional impacts are expected and that there is "ongoing" research into existing sulfate discharges.

- Direct wetland and stream impacts have been discussed, but indirect impacts such as drawdown and inundation with polluted waters have been omitted. Mitigation ratios for direct impacts are discussed but no actual mitigation plans have been provided.

- Private drinking water wells have been identified in the vicinity of the proposed mine pit extensions and the possibility of draw down briefly discussed as an unknown potential impact of the project. Impacts to potable water due to groundwater contamination are not evaluated.

- It is indicated that the West Pit would eventually fill and outflow to the West Branch of the West Two Rivers without discussing impacts of the outflow due to polluted water from in-pit stockpiling or discussion of existing MN WQS violations. Page 29 states "[I]ncreased in-pit disposal may result in runoff, and therefore mine sump dewatering discharges, with elevated concentrations of certain dissolved constituents (e.g., sulfate, hardness, alkalinity, chloride). This could result in an increase of these constituents in downstream receiving waters…"

- The current rate of water discharge averages 20.5 MGD with an expected 5% increase due to this extension. Water consumption and inter-basin water transfer far exceeds the Great Lakes Charter of 1985 that states: '[T]he purposes of this charter are to conserve the levels and flows of the Great Lakes and their tributary and connecting waters...[T]he principle of prior notice and consultation will apply to any new or increased diversion or consumptive use of the water resources of the Great Lakes Basin which exceeds

[15] *See Friends of Pinto Creek v. E.P.A.*, 504 F.3d 1007, 1013-14 (9th Cir. 2007) (mining company was not entitled to NPDES permit under CWA in connection with new copper mine, even though permit was conditioned on company partially remediating discharge from another mine, because creek was already impaired by excess of copper pollutant, permit allowed company to discharge additional amounts of dissolved copper into creek, and there was no indication of any compliance schedule that would bring creek within water quality standards.)

5,000,000 gallons per day average in any 30-day period. Minntac exceeds the 5 MGD consumptive use required for notice, consultation and approval of all of the Great Lakes States Governors, and cannot be "grandfathered in" using a 2003 water appropriations permit. There is no discussion regarding consultation and approval that must be sought before any expected increase can occur.

- On Page 29 there is a brief discussion regarding the seepage barrier that was installed to prevent polluted tailings basin water from reaching the Sand River and potentially building a similar system to prevent the same seepage from reaching the Dark River. There is no mention that the reductions of sulfate resulting from barrier installation are not enough to cause compliance with MN WQS, or if any other measures under consideration would result in compliance with MN WQS in either the Sand River or the Dark River. And, there is no mention of the 200 acres of wild rice that has already been destroyed by Minntac tailings basin seepage.

- Existing groundwater contamination is not discussed in the EAW. The EAW indicates that MPCA's "Groundwater Contamination Susceptibility in Minnesota" map identifies the project as having Low Susceptibility. Yet the groundwater around the tailings basin is known by both Minntac and MPCA to be contaminated by Minntacs operations.

III. Both the existing and planned Minntac operations damage treaty-protected fisheries and wild rice habitats.

As noted, these are not only violations of the CWA, but they cause impermissible damage to the Bands' treaty resources. The EAW makes no mention of these interests. Releases of high concentrations of sulfates, chlorides, hardness, and conductance from permitted seeps, and the dilution and discharge of tailings basin waters has and is likely to continue to damage at least two treaty resources in the Sandy, Dark, and West Two River watersheds: fisheries and wild rice.

As for the fisheries directly connected to and continually affected by the Minntac operations, releases into the Sandy River watershed flow into the Pike River and eventually into Pike Bay of Lake Vermilion. Pike Bay is used extensively as a fishery by tribal members. Pike Bay also provides critical fish spawning habitat and is home to a walleye spawn collection facility. A portion of the Dark River is a designated trout stream, and it appears that releases of tailings basin waters through permitted seeps to this watershed could have significant impacts on the trout population. Permitting more discharges of diluted tailings basin waters to the West Two River will also likely cause an increase in the concentrations of sulfates to both the West Two River and portions of the St. Louis River, potentially impacting fisheries used by tribal members.

Sampling conducted by Fond du Lac in 2006 at various points along the West Two River found high concentrations of sulfates near the Minntac facility with a gradient of reduced concentrations further away from the facility. Likewise, concentrations of chloride, conductance, and total suspended solids all decreased the further downstream the sampling points were from the facility. Based on recent research, it is unquestionable that the presence of

sulfates promotes the methylation of mercury. Sampling conducted by MPCA as early as 2001 showed relatively high concentrations of methylmercury in the Sandy and Pike rivers. The St. Louis River is impaired throughout its entire watershed for mercury in fish, and is the subject of a toxics TMDL study to address sources and mechanisms for reductions. Due to sulfate releases and resulting high methlymercury concentrations downstream from existing tailings basin seepage points, mercury content of fish in all of the receiving watersheds is likely increasing. Any additional releases into these watersheds will further negatively impact the fishery resources, potentially affecting the health of tribal members consuming fish. This impact must be evaluated in an EIS and Minntac must mitigate and correct these ongoing impacts to the Bands' treaty resources.

Second, wild rice is a culturally significant resource for the tribes in northeastern Minnesota. From historical reports and Band member accounts, wild rice has declined significantly in Sandy and Little Sandy Lakes (the "Twin Lakes") since the late 1960s or early 1970s. In 1989, there were more than 200 acres of wild rice in the Twin Lakes. Evidence points to changes in water quality as the leading factor of decline. Again, releases from Minntac operations are suspected as the primary cause. Based on MPCA's recent water depth analysis for wild rice, water levels are still suitable for wild rice growth. Survey work conducted by the 1854 Treaty Authority and Fond du Lac in multiple years between 2003 and 2011 found several good stands of wild rice remaining in the Pike River. Additional sulfate releases into the Sandy and Pike River watersheds will likely further deplete wild rice stands. This impact, too, must be evaluated in an EIS, along with proper mitigation.

IV. Additional deficits in the EAW.

The following areas, among others, also require significant additional information which can only be accomplished through an EIS:

- Sec. 8, *Permits and approvals required* (pgs. 6-7). This section makes no reference to the required Section 106 consultation with the Bands under the National Historic Preservation Act or the need for EPA approval of a current NPDES permit.

- Sec. 11, *Fish, wildlife and ecologically sensitive resources* (pgs. 11-16). This section makes no reference to wild rice and sturgeon, both species of exceptional cultural significance to the Bands, and which exhibit sensitivity to high-sulfate waters.

- Sec. 25, *Nearby resources*, Archaeological, historical or architectural resources (pages 40-42). This section reflects no consultation with the Bands' Tribal Historic Preservation Offices ("THPOs"), and no recognition of any tribal historic sites, only with the State Historic Preservation Office in addition to a literature search. Likewise, the Bands have not been invited to participate in the USACE-SHPO Programmatic Agreement for historic review. *See* pg. 7.

Please let us know of questions. Thank you.

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

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